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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 702.

KEITH L. MANION et al., *Petitioners,*

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY,
a Corporation, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT.

Petitioners seek to review the decision of the Missouri court enjoining a strike called by petitioners in violation of their collective bargaining agreement and the Railway Labor Act. The court below exercised its traditional

power as an equity court to prevent an unlawful strike where the remedy at law was inadequate.

Respondent is a large railroad terminal offering passenger and freight repair, switching, interchange and transfer service to the twelve interstate railroads running into and out of Kansas City, Missouri, freight switching service to 254 industries in the two Kansas Cities, and mail handling to the United States Postal Service. It also operates the Kansas City, Missouri, Union Station affording terminal facilities to the traveling public using 142 passenger trains daily (Tr. 75-98; Pl. Ex. 11, Tr. 81, 87). The disastrous effect of a strike and picket lines upon the public, the railroads themselves, and the many industries served by these railroads, and the consequent disruption of interstate passenger, freight and mail transportation, is undisputed (Tr. 88-90, 92-101, 103-154).

Because of the misstatements and argumentative conclusions not supported by the evidence in petitioners' Statement of the case, respondent deems it necessary to state in detail certain facts contained in the record, only a small fraction of which petitioners have printed in their Appendix B.

There is no evidence to support petitioners' opening statements (p. 4) that petitioners had for many years been aggrieved over Terminal demands for overtime work and that the employees tried to remedy the situation in 1951 and again in 1953.

A complete collective bargaining agreement between Terminal and the Local Union of the B. L. F. & E. was negotiated and became effective on March 31, 1951 (Pl. Ex. 1, Tr. 48, 55), which contains as the fourth attachment thereto an overtime rule known as the "Ninth Hour Rule."

This was an "impractical and impossible rule" from the Terminal's standpoint because it prevented Terminal from effective control in *minimizing overtime* (Tr. 251-2, 254). Terminal, therefore, in 1953, was agreeable to negotiating with petitioners in mediation a settlement of time claims filed by petitioners under this rule so that Terminal "could buy that rule and secure a rule that [it] wanted" (Tr. 254, 260-261).

Ruben Eschler, a Vice-President of B. L. F. & E. (Tr. 215), who represented petitioners in the 1953 negotiation (Tr. 242), admitted that Terminal wanted to get rid of the "Ninth Hour Rule" and obtain a more satisfactory overtime rule (Tr. 242). He was not sure whether Terminal or Mediator MacSwan prepared the new rule "but it was a standard rule and it was finally agreed to put it in the contract" (Tr. 245).

The new rule (known as the "No New Work Rule") so adopted became effective on April 16, 1953, and is set out in Plaintiff's Exhibit 2 (Tr. 48, 55).

On December 21, 1953, petitioners, through their General Chairman Manion, submitted a proposal (Deft. Ex. 16, Tr. 161) to change the "existing agreement." Petitioners wanted to change Article III (Basic Day), Article XII (Discipline and Hearings), Article XXIII (Equipping and Supplying Engines), and to add new Articles XXX (Parking Lot Facilities) and XXXI (Copies of Agreement). (Petitioners' proposal was not, as the petitioners imply, limited to a change in the overtime rule.)

Terminal, on January 19, 1954, served on petitioners (Def. Ex. 22, Tr. 161) its counter proposal for other rule changes (Pl. Ex. 52, Tr. 256-7). After a conference, Terminal and Manion were unable to agree on any of the proposed new rules (Tr. 256-7).

Item 4 of the strike ballot of February 2, 1954 (Def. Ex. 27, Tr. 162) concerned petitioners' proposals for "proper application of the 'No New Work Rule,' electric water coolers on all engines, standard storm windows on all the engines, and various other items."

Article VII, Section 2, of the collective bargaining agreement of March 31, 1951 (Pl. Ex. 1, Tr. 48, 55), governs the handling of claims for time not actually worked. Section 2(c) provides that such claims "shall be barred" if disallowed by the highest officer designated to handle such claims, "unless within six months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before a tribunal having jurisdiction pursuant to law or agreement of the claim or grievance involved."

After the adoption of the "No New Work Rule" in April, 1953, petitioners, beginning on June 26, 1953, filed claims for penalty pay for alleged violation thereof (Stip. of Facts, Tr. 50). Petitioners admit (p. 4) that Terminal has paid for the actual overtime work done. Petitioners' statement that the employee regarded requests to work overtime as a request to start a second shift is not supported by the evidence. It was stipulated by the parties (Tr. 50) that these were "claims for an additional day's penalty at the rate of time and a half." Violation not only of the overtime rule, but also of certain switching and other rules, was alleged (Stip. of Facts, Tr. 50-51).

Over 100 of these claims were disallowed by Terminal on September 25, 1953 (Tr. 52). By the time of trial, the aggregate of the claims for penalty pay which had been filed and declined on the merits after thorough investigation (Tr. 74-5) (Deft. Ex. 42, Tr. 169-70) was in excess of $54,000.00 (Tr. 53).

These time claims were the subject of conferences and correspondence between Terminal and General Chairmen and Vice-Presidents of the B. L. F. & E. during the summer and fall of 1953 and January of 1954 (Tr. 255, 256) (Deft. Ex. 17, Tr. 161; Deft. Exs. 19-27, Tr. 161, 162; Deft. Exs. 41-46, Tr. 167-70). Terminal and the Union were in basic disagreement over the interpretation of the "No New Work Rule." The issue was whether work begun before, but finished after, the eighth hour was a violation of the rule (Tr. 68-9; Pl. Ex. 2, Tr. 48, 55).

Terminal repeatedly told Vice-President Eschler and General Chairman Manion that its position was that the time claims would have to be submitted for adjudication to the National Railroad Adjustment Board or to a supplemental adjustment board on the property (Tr. 69-70, 229-30), and both refused (Tr. 61, 69-70).

It was stipulated (Tr. 53-4):

> No proceedings to enforce the payment of any of the foregoing time claims have ever been instituted by any defendant or his duly authorized representative before any court or before the National Railroad Adjustment Board or before any tribunal having jurisdiction thereof pursuit to agreement of the parties.

After the Terminal received the strike ballot on February 3, 1954 (Deft. Ex. 27, Tr. 162), the first three items of which included (1) overtime rule claims, (2) claims regarding other crews switching an industry, and (3) miscellaneous time claims, it requested (telegram of February 11, 1954, App. B, p. 51), invocation of services of the national Mediation Board to prevent the strike over the proposed rule changes (Item 4 on the strike ballot), stating specifically that its position was that the items on the strike ballot (Items 1, 2, and 3) with reference to time

claims were proper cases for the National Railroad Adjustment Board.

Petitioners say (p. 5) they promptly advised the Mediation Board they desired the Board to mediate the entire dispute. This is not true. In fact, they *never* asked for mediation of the time claims. Eschler testified (Tr. 236):

> Q. * * * outside of furnishing a copy of the strike ballot, the B. L. F. & E. never invoked the services of the Mediation Board, did it?
>
> A. No.

Petitioners said in their reply brief in the Missouri Supreme Court (p. 20): "The Terminal knows, as well as the appellants know, that it is not consistent with Section 5 of the Railway Labor Act for employees to petition the Mediation Board for its services to aid in resolving a dispute based on grievances."

The Board, on February 15, 1954 (Deft. Ex. 31, Tr. 164), asked petitioners for a statement of their position, and on March 9 (Deft. Ex. 33, Tr. 165-6) petitioners advised that they would not strike if the Board intended to accept jurisdiction with the understanding that all matters in dispute would remain in *status quo* (Deft. Ex. 33 was offered and admitted only for the purpose of showing petitioners' position, not as evidence that the statements made therein are true Tr. 165-6.)

On March 11, the Board wired Terminal (Deft. Ex. 34, Tr. 166):

> C. E. Breternitz, VP Operation 1954 March
> K. C. Terminal Rwy. Co. 11 P.M. 5 17
>
> Re exchange correspondence beginning your telegram February eleventh regarding threatened work

stoppage by BLF&E that organization informs us they served section six notice on you dated December 21, 1953 relative to switch crews working overtime also that you served on January 19, 1954 a six page counter-proposal to eliminate many standard rules contained in other contracts. These appear to be mediable matters. Please wire your statement regarding them.

E. C. Thompson, Secy NMB.

Terminal replied March 12 (Deft. Ex. 36, Tr. 166-7), again stating its position that the proposals for rule changes were mediable matters, but that the time claims were not.

The Board on March 15 advised that it had docketed the application "on all mediable items." (Deft. Ex. 35, Tr. 166-7).

President Gilbert (of the B. L. F. & E.) wired General Chairman Manion March 15 (Pl. Ex. 50, Tr. 241):

CT.CLD460 DL PD = Cleveland, Ohio 15 516 PME =
K. L. MANION =
1408 West 41 St. KSC = 1954 Mar 15 PM 6 37

Following telegram from Mediation Board date quote re exchange correspondence concerning dispute between Kansas City Terminal Railway and Brotherhood of Locomotive Firemen and Enginemen in connection with the items covered by Brotherhood's strike ballot dated February 2, 1954. The National Mediation Board has docketed application for mediation by carrier on all mediable items in this strike ballot as our Case No. A-4448. Attention of both parties is called to provisions of Section Six, Railway Labor Act. A mediator will be assigned to handle promptly. Please acknowledge. Joint Breternitz and Gilbert. Unquote. Understand mediator will be on your property early next week. Please keep this office advised of expiration of time limit on your claims so that if

necessary we can set strike date to force status quo on time claims as well as mediable matters referred to by Mediation Board =

H. E. Gilbert =

It is admitted that the Terminal, at all times, adhered to its position that the time claims were not mediable matters. It is also admitted that petitioners at no time invoked the services of the Mediation Board (Tr. 236) and that "the Mediation Board has no jurisdiction or authority to make either party discuss anything if they refuse." (Tr. 235).

Vice-President Eschler also admitted (Tr. 229) that he was advised by Mediator Lane (assigned to the case by the National Mediation Board, Tr. 220-221) that the Terminal was willing to have the time claims disposed of by a Special Board but that he, Eschler, would not agree.

On March 25 Eschler advised Gilbert (Pl. Ex. 6, Tr. 56, 58) that "one hundred time claims expired under Section 17 today," and requested authority to call a strike at 6:00 p. m., March 29, "on the docket of cases only." (By Section 17 he referred to the time limit provision of the National Agreement, identical to Article VII, Section 2, of the B. L. F. & E., agreement with the Terminal, Tr. 58.)

Petitioners attempt on page 6 to make it appear that the Board proffered its services over the time claims dispute before the restraining order was issued. This is not true.

At 12:30 p. m., March 26 (Tr. 70), Terminal received the following wire (Pl. Ex. 7, Tr. 59):

1954 MAR 26 PM 1207
U D Kansas City, Mo.
(S. WA100) GOVT DL PD-Washington, Mar 26 1141 AME—
C. E. Breternitz, Vice Pres. Operations—
(RTE UD)—Kansas City Terminal Railway Co KSC—

We have advised from Brotherhood of Locomotive Firemen & Enginemen they are setting date for withdrawal of employees represented by that organization on Kansas City Terminal Railway as of 6 P. M., Monday, March 29th. Please furnish any statements you may care to make—

E. C. Thompson Secretary National Mediation Board—

This suit was filed at 1:30 or 1:45 p. m. and the principal defendants were served by 3:30 or 4:00 p. m. (Tr. 71-2).

Not until at 4:30 p. m. (Tr. 73) did Terminal receive the wire from the Mediation Board urging conferences on time claims (App. B., p. 52).

Terminal replied March 27 (Pl. Ex. 10, Tr. 72-5):

Kansas City, Missouri
March 27, 1954

E. C. Thompson, Secretary
National Mediation Board
Washington, D. C.

Re your two wires of the 26th. Following receipt of first wire notifying us of intended work stoppage by the BLF&E restraining order was issued by state court of Missouri against BLF&E. Terminal requests Mediation Board to retain jurisdiction on mediable items which are Item 4 on BLF&E strike ballot and footnote and mediation continue on their pro-

posed rule change and our counter proposal to be handled concurrently.

C. E. Breternitz, Vice Pres-Operation
Kansas City Terminal Railway Company

Petitioners did not reply until March 29, when they sent the following (Deft. Ex. 38, Tr. 167):

March 29, 1954

E. C. Thompson, Secy.,
National Mediation Board
Washington, D. C.

Procedure suggested your wire March 26, Kansas City Terminal Railway, acceptable to BLF&E but since carrier has obtained court restraining order against strike set for 6:00 PM March 29, 1954 same is being recessed in deference thereto.

H. E. GILBERT

On the same date the Board advised that the mediation proceeding was recessed (Deft. Ex. 37, Tr. 167).

ARGUMENT.

The Kansas City Court of Appeals held (App. A., p. 1):

1. More than six months elapsed between the last denial of the time claims and the issuance of the injunction (p. 3).

2. Respondent invoked the services of the Mediation Board only with respect to the prospective rules changes (p. 4).

3. The Mediation Board had no power by statute to decide disputes over time claims, that power being vested by statute in the Adjustment Board (p. 8).

4. The threatened strike violated both the collective Bargaining Agreement and the Railway Labor Act (p. 15).

The Supreme Court of Missouri also held that the time claims dispute had not been submitted to the Mediation Board and that that Board had no power to decide such dispute (App. B., pp. 67-8).

The amended petition (App. B., p. 37) limited the relief sought to the prevention of a strike to enforce the payment of time claims for penalty pay and the injunction likewise limited its restraint to a strike to enforce these claims (Tr. 264-6).

The Norris-LaGuardia Act (29 U. S. C. 101) is not involved in this case.

This Court has repeatedly upheld injunctions to prevent the breach of a duty imposed by the Railway Labor Act (*Virginian Ry.* v. *System Federation et al.*, 300 U. S. 515, 57 S. Ct. 592; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 65 S. Ct. 226). The Missouri and other state courts have repeatedly upheld injunctions to prevent a strike in breach of a contract (*Adams Dairy Co.* v. *Dairy Employees Union et al.*, 363 Mo. 182, 250 S. W. 2d 481; *Nokol Co.* v. *Becker*, 318 Mo. 292, 300 S. W. 1108; *Sheet Metal Workers Local 249* v. *Heating Co.*, (Ark.) 264 S. W. 2d 597; *Goldman* v. *Cohen*, 227 N. Y. S. 311; *Stephenson* v. *N. O.*, 180 Miss. 147, 177 So. 509; *Central of Georgia Ry.* v. *Culpepper*, 209 Ga. 844, 76 S. E. 2d 482). The legal basis of these cases is best stated by the Pennsylvania Supreme Court in *General Bldg. Contr. Ass'n* v. *Local Unions 542*, 370 Pa. 73, 87 A. 2d 250, 254:

> The subject matter of the instant action is a collective bargaining agreement and the power of the court invoked is the power to require adherence to such agreement, to prevent a breach thereof and to

prevent irreparable damage to a party to that contract * * *. No more is involved here than an action in equity to preserve the existence of a valid and subsisting contract and to compel parties there to recognize, adhere to and perform duties and obligations, contained therein. Evidence of irreparable damage threatened and imminent, together with the recognition of the contract by the Union and acceptance of the benefits of the contract, justifies intervention of a court of equity to preserve contractual rights and to enforce performance of the solemn duties assumed.

* * * * * * *

We can agree that federal labor legislation must be regarded as a single integrated program. It does not follow, however, that assertion of power over labor disputes and employe-employer relations deprived state courts of equity from exercising their traditional power to require performance of solemn contractual duties and, by injunctive relief, to prevent irreparable damage which would be brought about by failure to perform such duties.

* * * * * * *

Prevention of violation of obligations contained in a contract by injunctive relief is a power traditionally exercised by courts of this Commonwealth * * *. Enforcement of contracts may be required according to the usual processes of the law.

The decision below is therefore on an adequate non-federal ground, is clearly correct, is not in conflict with any decision of this Court, is in accord with the applicable decisions of this Court, and is decided the way this Court would probably decide it.

I.

The Decision Below Is on a Non-Federal Ground Adequate to Sustain It.

The court below put its decision on two grounds (1) a violation of the collective bargaining agreement and (2) a violation of the Railway Labor Act (45 U. S. C., § 151, *et seq.*, App. A., p. 15). The former is a non-federal ground; the latter is a federal ground. Where there are two grounds for the decision, one of which is a non-federal ground sufficient and adequate to sustain the decree (as we shall demonstrate), this Court will not review on certiorari, even though a federal question may also have been decided (*Fox Film Corp.* v. *Muller,* 296 U. S. 207, 56 S. Ct. 183).

The agreement between the parties provided that all time claims shall be barred unless within six months after the date of their final denial proceedings are instituted by the employees before a tribunal having jurisdiction pursuant to law (Pl. Ex. 1, Tr. 48, 55). The issue tried and decided was whether petitioners did so institute proceedings before such a tribunal within the meaning of the contract—*i. e.,* whether petitioners breached the contract.

Respondent claimed petitioners instituted no proceedings of any kind and the Adjustment Board was the only tribunal having jurisdiction pursuant to law. It was stipulated petitioners submitted none of these time claims to the Adjustment Board nor to any tribunal having jurisdiction pursuant to agreement of the parties (Tr. 53, 54).

Petitioners claimed proceedings were instituted (although admittedly *they* instituted none) before the Mediation Board which they claimed complied with the agreement.

Both Missouri courts held that petitioners had breached the contract.

This issue of the petitioners' breach of contract is clearly a non-federal ground. The question was the meaning of the words "proceedings instituted" and "tribunal" and "jurisdiction pursuant to law." While their meaning was to be determined, in part, by reference to the powers given the Adjustment Board and the Mediation Board by the Railway Labor Act (45 U. S. C. §§ 153, 155), the rights asserted by petitioners arose under and by virtue of the contract, not the Railway Labor Act. Petitioners claimed their strike was lawful because they had not breached the contract. Nothing in the Railway Labor Act confers upon petitioners the right to have the Mediation Board adjudicate disputes over time claims. Petitioners' rights, and the legality of their conduct, were measured by their compliance (or non-compliance) with the agreement.

The railway labor contract cases directly support this analysis. A railroad employee having seniority and other employment rights secured by a collective bargaining agreement sues the carrier, and sometimes his craft representative, for an alleged breach, claiming interference with or a denial of his seniority rights, etc. He purports to ground federal jurisdiction on an alleged federal question. Uniformly the courts have held that his rights arise under the contract, not the Railway Labor Act, even though the contract is negotiated and concluded under the provisions of that Act, and have denied jurisdiction on the federal question ground. *Starke* v. *N. Y. C. & St. L. R. Co.*, (7 Cir.) 180 F. 2d 569; *Barnhart* v. *Western Md. Ry.*, (4 Cir.) 128 F. 2d 709. See also *Blankenship* v. *Kurfman*, (7 Cir.) 96 F. 2d 450.

The "jurisdiction" of the Mediation Board is involved in this case only to the extent of determining whether

the words "tribunal having jurisdiction pursuant to law" in the agreement include the Mediation Board. That is not a federal question; that is a construction of contract question. Petitioners never claimed otherwise until their pending Petition for Certiorari. Nothing in their answer (App. B., p. 38) or after trial motion (Tr. 266) treats this question as anything other than a construction question. Their assignment of error in the state court was simply that the trial court erred in failing to find they had complied with the agreement because (App. B., p. 55) "the running of the six months limitation period was stayed by appropriate proceedings instituted within the period allowed by the * * * agreement."

Petitioners in their reply brief in the Missouri Supreme Court (pp. 14-15) said:

> * * * If the contracting parties had named the tribunals that they had in mind, there would probably be no construction of the contract required, and perhaps no argument to be decided.

The Missouri Supreme Court said of petitioners' contentions before it (App. B., pp. 62, 63, 69):

> Appellants say the appeal presents three questions for decision: * * * (2) whether the time claims denied on September 25, 1953, by plaintiff's "highest officer designated to handle claims and grievances," became barred on March 26, 1954, by reason of the six month contractual limitations provision in a collective agreement applicable to the employees (p. 62);
>
> * * * Appellants further insist * * * (2) *that the strike was not a breach of the contract* (p. 63).
>
> * * * the case requires a construction of the contract entered into between the parties * * * (p. 69) (Emphasis ours).

Even in their Application for Transfer (App. B., p. 74), petitioners were still contending the question was one "of proper construction of the agreement."

The court below was clearly right in holding that petitioners had instituted no proceedings before a tribunal having jurisdiction pursuant to law and that therefore they had unlawfully breached the agreement.

The burden of action was, by the contract, on petitioners. Time claims were barred within six months unless proceedings were instituted by them. They had two obligations: (1) to institute "proceedings," and (2) to institute such proceeding before a proper "tribunal." They did neither.

Petitioners stipulated (Tr. 53-4) that they instituted no proceedings before the Adjustment Board. The Mediation Board was not (as we shall demonstrate) a tribunal within the meaning of the contract, but Eschler, their chief witness, admitted they never even invoked the services of that Board (Tr. 236). Plaintiff's Exs. 6 and 50 (Tr. 58, 241) and Defendants' Ex. 33 (Tr. 166) corroborate this admission. Even on March 25 when the claims expired, Eschler simply threatened to strike unless *Terminal* agreed to put the time claims in mediation (Pl. Ex. 6, Tr. 58, 223, 236). The Supreme Court of Missouri properly found (App. B., p. 68):

> The dispute was never finally submitted to the National Mediation Board; * * * the parties refused to submit their differences to mediation * * *.

Even if we assume however petitioners did invoke the services of the Mediation Board, it could not be a "tribunal having jurisdiction pursuant to law" within the meaning of the contract. The construction of these words is a pure question of law.

Webster's New International Dictionary, Second Edition, defines "tribunal" as:

> * * * a person or body of persons having authority to hear and decide disputes so as to bind the disputants.

This Court has defined "jurisdiction":

> Jurisdiction is the power to decide the case either way, as the merits may require. *Erickson* v. *U. S.*, 264 U. S. 246, 44 S. Ct. 310.
>
> By jurisdiction, we mean power to entertain the suit, consider the merits and render a binding decision thereon. *General Inv. Co.* v. *N. Y. C. R. Co.*, 271 U. S. 228, 46 S. Ct. 496.

The Adjustment Board is the only tribunal having jurisdiction pursuant to law of these time claims. Section 3 First (i) of the Act (45 U. S. C. 153 First (i)) grants *exclusive* jurisdiction to the Adjustment Board over disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Slocum* v. *D. L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577; *O. R. C.* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322; *E. J. E. R. Co.* v. *Burley*, 325 U. S. 711, 65 S. Ct. 1282.

The Mediation Board is by statute denied the power to hear and decide the merits of time claims or grievances arising out of the disputed interpretation of rules in a collective bargaining agreement. Its jurisdiction is only to "use its best efforts, by mediation, to bring the [parties] to agreement" in disputes "*not referable to the National Railroad Adjustment Board.*" (Emphasis ours). (Section 5 First (b), 45 U. S. C. 155 First (b)). Jurisdiction of this limited scope obtains whether a party invokes the services or the Board proffers the services. In either event, it has no "jurisdiction" *by law* to decide anything.

In *E. J. E.* v. *Burley, supra,* this court said of a mediable dispute, p. 725:

> No authority is empowered to decide the dispute and *no such power is intended,* unless the parties themselves agree to arbitration. (Emphasis ours.)
>
> * * * To break this log jam, and at the same time to get grievances out of the way of the settling of major disputes through the functioning of the Mediation Board, the Adjustment Board was created and given power to decide them.
>
> The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. Another tribunal of very different character is established with "jurisdiction" to determine grievances and make awards concerning them. * * *

The court below properly held that the strike to enforce the payment of the time claims after the expiration of the six months period breached the contract. It properly construed the agreement to mean that, by agreeing to institute proceedings before a tribunal having jurisdiction pursuant to law, petitioners impliedly agreed not to enforce their claims in any other manner and, having failed to so enforce their claims, they could not compel their payment by a strike. Missouri law is clear that the law will imply a promise to refrain from doing something contrary to that which is expressly promised. *Froedtert Grain Co.* v. *Mfg. Co.,* (E. D. Mo.) 110 F. Supp. 757; *Williams* v. *Patterson,* 240 Mo. App. 131, 218 S. W. 2d 156.

The only "authority" cited by petitioners in this Court or in the state courts that a strike ballot followed by meditation constituted the institution of proceedings before a tribunal having jurisdiction pursuant to law was witness Loomis (Pet., pp. 8-9). His testimony was properly ignored by the state courts because he was expressing solely

his own conclusions of law. It was of doubtful relevancy (Tr. 194) and of no weight. Over respondent's objections (Tr. 183, 192, 194, 195, 209), he purported to testify to his *own* interpretation in February, 1950 (Tr. 187, 191, 192, 195-7, 199, 201-205) of a different rule in a national agreement (Pl. Ex. 8, Tr. 60). His personal opinion changed between February and May, 1950 (Tr. 211, 213, 214). The rule in the national B. L. F. & E. agreement was actually written by Dr. Steelman, not negotiated by the parties (Tr. 186, 189). But even accepting at face value his own opinion on a question of law in February, 1950, he did *not* say, as petitioners claim, that *this* time limit rule in *this* Terminal B. L. F. & E. contract meant what petitioners say he said it meant. He said he thought the national ORC and BRT rule meant that the taking of a strike ballot followed by mediation would be the institution of proceedings (Tr. 191-209).

But that rule was very different from the national B. L. F. & E. rule. It omitted the phrase "before a tribunal having jurisdiction pursuant to law" and required only that the employee institute proceedings without designating the tribunal. Loomis explained that the reason why the Conductors and Trainmen would not agree to the additional language was (Tr. 201) that "the organizations feared that that was committing them absolutely to the use of the Adjustment Board or of arbitration." (See also Tr. 192, 205). This is precisely the legal effect of the additional language used in the national B. L. F. & E. agreement. Obviously, there is a vast difference in meaning between the language of the two rules. Loomis' opinion in February, 1950, that a strike ballot followed by a request of the Union for mediation constituted the institution of proceedings may or may not be sound. But that procedure is certainly not the institution of proceedings before

a tribunal having jurisdiction pursuant to law, and even Loomis did not have this opinion, when the Act plainly gives jurisdiction to hear and decide time claims to the Adjustment Board only. Loomis' February, 1950, opinion on the meaning of the Conductors' and Trainmen's rule is therefore immaterial on the question of the meaning of a different rule in the B. L. F. & E. agreement. He admitted that he recalled no discussion between the carriers and B. L. F. & E. whether or not the procedure of a strike ballot followed by a Union request for mediation was the institution of proceedings before a tribunal having jurisdiction pursuant to law (Tr. 187, 205).

But even the law of Loomis requires that the Union invoke the mediation (Tr. 196-7).

The futility of using Loomis as an authority is emphasized by his complete reversal of opinion. He himself pinpointed the ethereal character of his own testimony (Tr. 188):

> Q. Then a tribunal established by law would be established by law regardless of anything you wrote into the agreement, isn't that so?
>
> A. That is correct.

The undisputed facts in this case belie the claims in the Petition that the strike ballot "led to" or "resulted in" (pp. 9-10) a proffer of services by the Mediation Board or that that Board ever "assumed jurisdiction" (or attempted to) (pp. 16, 17, 18) or that Terminal "thwarted" any "responsibility" of the Mediation Board (pp. 9, 18) or that there was ever any "labor emergency." (pp. 10, 16).

On April 26, 1953, a new overtime rule was negotiated between the parties. Beginning on June 26, petitioners began filing claims for penalty pay. Terminal and Union disagreed on the fundamental interpretation of the over-

time rule. All the claims were investigated and denied on their merits. In August and during that fall, Terminal and Union representatives conferred on the property but their basic positions remained unchanged. On December 21, the Union served a thirty day notice to negotiate a change in the overtime and many other working rules. On January 19, 1954, representatives of both parties formally conferred on the proposed rules changes and Terminal served counter proposals. On February 3, the Union took a strike vote on all the rules changes and on claims for penalty pay. Because a strike at that time over rules changes was lawful, Terminal asked for mediation on the rules changes only. After correspondence with the Union in which the Mediation Board made it very plain it understood the mediation was only on the rules changes, the Board docketed the case on the rules changes dispute only. The mediator appeared on the property on March 23. Petitioners refused to mediate the rules changes dispute unless the time claims were also settled in mediation. Terminal refused to mediate the time claims. There was nothing to mediate; the parties disagreed in their basic interpretation of the overtime rule; the claims were ripe for adjudication. Previously Terminal had offered and again it offered, to submit the claims to the National Adjustment Board or to a supplemental board. Petitioners refused both. Eschler knew that the claims became outlawed on March 25. Nevertheless, the Union notified the Mediation Board on March 26 it would strike on March 29. Terminal received this notice at 12:30 p. m., together with a request for a statement. It immediately filed its petition for injunction and secured and served a restraining order upon the principal defendants by 3:30 p. m. Not until 4:30 p. m. was it requested by the Mediation Board to "enter into conferences" with the Union on the time claims. It advised the Board it had secured the restrain-

ing order and the Board promptly recessed the rules changes case.

There was thus never any "proffer of services" by the Mediation Board nor any attempt by it to assume "jurisdiction" of the claims for decision. It took no action to prevent the strike. All it ever asked the parties to do was to confer—and this only *after* the suit was filed and the restraining order served. No emergency existed at that time because it had been eliminated by the restraining order. Whatever "responsibility" the Board had was discharged by its request for statements (for that is all it did when it learned of the strike) and that afforded the public scant protection from a paralyzing strike in interstate transportation in the Missouri valley. Terminal "thwarted" nothing. Its position had been known to petitioners since August, 1953. They even say they knew Terminal would try to get an injunction if they struck (Tr. 223). They were not misled nor prejudiced.

The Mediation Board had no "responsibility" to decide time claims. This injunction is not against the Board and does nothing but restrain defendants from an unlawful strike.

Petitioners claim (pp. 3, 14-18) that the Union has the mandatory right under the Railway Labor Act to a compulsory settlement by the Mediation Board of outlawed claims for penalty pay. Merely because, they say, time claims are include in a strike ballot along with prospective rules changes, the Union thereby can require the compulsory mediation of the time claims, even though the Union does not invoke the services of the Mediation Board and the carrier does not consent to the mediation. There is no merit in such a position.

The Mediation Board has no power to adjudicate any time claims, barred or otherwise (45 U. S. C., § 155 First) and this Court has said, as Congress has said, that even the settlement of "major disputes" is "the traditional *voluntary* processes of negotiation, mediation, *voluntary* arbitration, and conciliation." (*E. J. E. R. Co.* v. *Burley, supra,* 325 U. S. at 725) (Emphasis ours). There can be no statutory right given petitioners to *compel* respondent involuntarily to settle these outlawed claims. Petitioners so agreed below, as the Supreme Court of Missouri pointed out (App. B., p. 67):

> Appellants [petitioners] admit that the National Mediation Board "has no authority to force settlement, but rather proceeds by attempting to persuade the parties to reach a voluntary agreement." (Insert ours).

And Eschler said the same thing:

> Q. Now, the Mediation Board has no such power * * * [to hear and decide the merits of time claims] * * * unless it is conferred by the agreement of the parties? (Insert ours).
>
> A. That is correct (Tr. 230-1).
>
> * * *
>
> A. The Mediation Board has no jurisdiction or authority to make either party discuss anything if they refuse (Tr. 235).

For all the foregoing reasons, it is apparent the decision below is on an adequate non-federal ground and is correctly decided. Petitioners claim no rights under Section 5 First of the Railway Labor Act denied below.

II.

The Decision Below That the Railway Labor Act Prohibits This Strike to Enforce the Payment of These Time Claims Is in Accord with the Applicable Decisions of This Court.

These time claims were barred by the agreement and, therefore, they constituted illegal demands. The Missouri court's injunction to prevent the strike to collect these stale claims is precisely in accord with the holding of this Court in *Dorchy* v. *Kansas*, 272 U. S. 306, 47 S. Ct. 86. There a strike had been called by a labor union to enforce payment of a disputed monetary claim of a former employee. In holding that the strike was unlawful, Justice Brandeis said (p. 311):

> * * * the right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. *To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court.* * * * *To enforce payment by a strike is clearly coercion.* * * * *Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike* (Emphasis ours).

There is nothing in the Railway Labor Act legalizing such a strike. The language of the Act itself and the opinions of this Court construing it demonstrate conclusively that the National Railroad Adjustment Board was established by Congress with exclusive jurisdiction to determine

the merits of time claims and make a final award binding upon both parties (45 U. S. C. 153 (i) (j) (k) (m)).

The general purpose of Congress in passing the Act was commented upon by this Court in *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 565, 50 S. Ct. 427:

> The Brotherhood insists, and we think rightly, that the major purpose of Congress in passing the Railway Labor Act was "to provide a machinery to prevent strikes."

and again in *Slocum* v. *D. L. & W.,* 339 U. S. 239, 70 S. Ct. 577, when it said (p. 242):

> The plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes.

In *E. J. E. R. Co.* v. *Burley,* 325 U. S. 711, 65 S. Ct. 1282, this Court (pp. 725-8) discussed the 1934 amendments to the Act. It there pointed out that under the 1926 Act there had been a complete breakdown in the machinery for the settlement of grievances, that the old Mediation Board had been helpless, and that it was to get rid of the large backlog of accumulated grievances, and, at the same time, to get the grievances out of the way of the settling of major disputes, that "the Adjustment Board was created and given power to decide them [grievances]." (Insert ours). It also noted that the aim of Congress in creating the Adjustment Board was to "add decision where agreement fails."

In *Slocum* v. *D. L. & W. R. Co., supra,* and *O. R. C.* v. *Pitney,* 326 U. S. 561, 66 S. Ct. 322, this Court also discussed the purpose for which the Adjustment Board was created, its composition, and its peculiar ability to understand and adjust the problems involved in grievances arising out of the interpretation of working rules in collective bargaining

agreements. It held that Board had jurisdiction over such disputes to the exclusion of the jurisdiction of any court. We cannot believe that this Court meant to hold that where no court has the right to determine the merits of time claims or to enforce the payment thereof, that one party is free to make its own unilateral interpretation and then enforce its determination by a strike.

It is apparent, therefore, that the construction placed upon the Railway Labor Act, by the Kansas City Court of Appeals is not only in harmony with, but is compelled by, the language of the Act and the decisions of this Court. If there is a federal question of substance presented by the opinion below, it has been correctly decided.

Petitioners try to make it appear (pp. 2, 11-13) that the issue in this case is whether the employees have the right to strike to enforce the collective bargaining processes—the "major disputes"—under the Railway Labor Act. There is no such issue. The real issue is much more limited. It is whether these petitioners have the right to strike to enforce the payment of these time claims. There is no collective bargaining or "major dispute" involved.

Petitioners assume Terminal's violation of the agreement by its "wrongful interpretations and application" (p. 2). This is the issue respondent has always contended must be submitted to the National Railroad Adjustment Board (or a Special Adjustment Board) for determination. Respondent does not concede that petitioners have the sole right to interpret the agreement.

Petitioners' treatment of the *Burley* case (p. 11) is indicative of their handling of the evidence. By lifting sentences out of context, they have this Court saying that "disputes over grievances" are "disputes over the formation of collective agreements." Then, they follow with

the statement that this case "fits the category of a 'major dispute.'" (p. 11).

Again, petitioners misstate the issue. This Court knows that "minor disputes" in the railroad industry are disputes over grievances and that time claims are grievances (*E. J. E. R. Co.* v. *Burley, supra*).

The undisputed evidence demonstrates that the reason for the calling of this strike was to enforce the time claims —and nothing else.

1. In its amended petition, Terminal prayed the court, "to issue its permanent injunction * * * enjoining and restraining defendants * * * from attempting to enforce the payment of the aforesaid time claims by [striking] * * *." (App. B., p. 37).

2. The answer admits "* * * defendants did authorize a strike on account of certain time claims and other matters * * *." (What the "other matters" are is not disclosed.) (App. B., pp. 39-40.)

3. Counsel for petitioners in his opening statement did not contend otherwise. He said:

> Now, under the contract between the Terminal and its employees, represented by the Brotherhood of Locomotive Firemen and Enginemen, certain disputes arose over the application of the overtime rule and other rules. The overtime rule is by far the largest part of the violation, which is proclaimed by the employees. There were some other rules. The procedure provided by the contract was followed. The claims were presented to the various officers of the carrier. There were two stages of that, and then, *a group of them was finally declined by this officer.*
>
> At that point, the representatives of the employees, * * * *spread a strike ballot.* * * * At the time the services [of the Mediation Board] were invoked

there were two outstanding disputes. One was that the employees wanted a modification in certain terms of the contract. * * * Part of the dispute related to certain changes, which had been proposed by the union, at the same time a counter-proposal was submitted by the carrier, in which it wanted to change certain of the rules. In addition to that, *the strike ballot covered the time claims.* The membership were informed that a large number of time claims had accumulated and efforts to adjust them with the carrier had been unsatisfactory, and were asked whether it was desired to call a strike in order to assist in enforcing the time claims. * * * (Tr. 37-39).

* * * I will say frankly, we don't know of any decision that is exactly in point with this case the other way, but we think there is an absolute dearth of authority that the recourse to the Adjustment Board is the exclusive remedy of a union, and *that a strike in order to enforce time claims is an unlawful strike* (Tr. 44) (Emphasis ours).

4. Petitioners' General Chairman Manion testified (Tr. 62):

Q. And what were you striking over?

A. All matters in the time claims.

5. Petitioners' Vice-President Eschler testified (Tr. 222):

* * * I advised the Mediator that unless the time claims were also included in the mediation conferences that I would suggest to the International President the advisability of setting a strike date. * * *

6. President Gilbert in his telegram to Manion March 15 (Pl. Ex. 50, Tr. 241) said:

* * * Please keep this office advised of expiration of time limit on your claims so that if necessary we can set strike date to force *status quo* on time claims *as*

well as mediable matters referred to by Mediation Board (Emphasis ours).

7. Eschler in his telegram to Gilbert of March 25, 1954 (Pl. Ex. 6, Tr. 56, 58) said:

> * * * One hundred time claims expired under Section 17 today. Therefore, the Committee and I request your approval to setting a strike date for 6 PM March 29 on the docket of cases only, continuing mediation conferences on rule changes * * *.

8. Petitioners in their brief filed in the Missouri Supreme Court said (pp. 1-2).

> The amount in dispute exceeds $7,500. Plaintiff seeks an injunction against the defendants' attempts to enforce $54,000 worth of time claims. If plaintiff is successful, then the record shows that there would be no possible remedy still available to defendants as to at least $17,000 worth of claims.

The Supreme Court of Missouri quoted petitioners' contention (App B., p. 65):

> * * * that "the suit seeks to enjoin defendants individually from striking in order to attempt to obtain an adjustment of the claims in issue"; that "the whole reason for this suit is that the appellants claim that respondent owes them money for breach of contract"; and that "the question here is how appellants may seek enforcement of their claims."

Petitioners' statement, therefore, on page 13 that "the instant case has been in the collective bargaining stage" is hardly true. The negotiations over the rules changes are in that stage, but rule changes are not involved in this case—and, of course, could not be. But the strike to enforce time claims is not collective bargaining.

Petitioners in their foot notes on pages 12 and 13 argue that they should not be compelled to take their

claims to the Adjustment Board because the docket is congested and there might be a delay. Such argument ignores the evidence that Terminal on at least three occasions offered to agree to a Special Board of Adjustment and petitioners, at all times, refused. Aside from this, how can Terminal's rights under the agreement and the Act and the public interest be prejudiced by the crowded docket of the Adjustment Board? Many cities have trial court dockets that are so congested that it takes years to get a civil lawsuit to trial, but has it ever been said that this gives an individual the right to collect an alleged debt by force?

Petitioners state (p. 14) that the decision below holds that the right to strike has been taken from the employees of the railroad industry. This is not true. The injunction preventing the attempt to enforce the payment of these admittedly barred time claims does not take away the right to strike, or interfere with the collective bargaining processes or the customary functions of the Mediation Board.

CONCLUSION.

This case involves only a contract between petitioners and respondent. Its construction by the Missouri court is clearly in accord with established law. We respectfully submit that the petition for writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 702.

KEITH L. MANION, *et al.*,

Petitioners,

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY,
a corporation,

Respondent.

REPLY BRIEF OF PETITIONERS.

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FOREWORD.

Though we are tempted to respond to all of the assertions of fact and law set forth in Respondent's brief, we will limit ourselves in this reply to the jurisdictional point raised in the brief in opposition, to-wit, the claim that the decision of the court below rests on adequate, non-federal grounds. This assertion of Respondent will not withstand analysis.

On the merits we again refer the Court to our petition. None of the authorities cited by Respondent gives the least support to its contentions, which depend on the startling proposition that the Railway Labor Act outlaws certain strikes *by implication,* in addition to expressly limiting this right in other respects not here involved.

POINT I. Since the Contract Clause Relied on by Respondent and Construed by the Court Makes Express Reference to "a Tribunal Having Jurisdiction Pursuant to Law, * * *" a Proper Decision on the Contract Question Requires an Interpretation of the Railway Labor Act and Is Therefore a Question of Federal Law.

The proper test for determining the presence of a federal question was expressed by the elder Mr. Justice Harlan in *New Orleans, Mobile and Texas R. R. Co. v. Mississippi*, 102 U. S. 135, l. c. 140:

> "* * * a case in law or equity * * * may, properly, be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either * * *."

In order to prevent the running of the limitation period on claims, it was necessary that they be progressed before a tribunal having jurisdiction pursuant to *law*. The only law establishing tribunals having jurisdiction over railway labor disputes is the federal law—the Railway Labor Act. In determining whether there has been compliance with the contract provision, a state court would have to construe and apply the federal statute. If such a court takes an erroneous view of the statute, its decision will necessarily be in error. The case therefore meets the test set out above, for presence of a federal question.

This whole area is extensively regulated by federal statutes. It is not surprising that the parties to the national agreements, the language of which was used in this agreement, saw fit to refer to the federal law in their contract. The thought that each state court which has this contract language before it can reach its own conclusion as to the meaning of the federal statute, but that such

views cannot be reviewed and harmonized by this Court, carries, in its very statement, its own refutation.

The Kansas City Court of Appeals construed the Railway Labor Act and the authority of the National Mediation Board, and held that the Mediation Board had jurisdiction only over disputes involving rule changes (Appendix of Pet. p. 8). As is shown in the petition, this conclusion flies in the teeth of the language of the statute, 45 U. S. C., Sec. 155, First (b), and is in conflict with the established practices of the Mediation Board, as disclosed by its annual report to Congress. If that court were correctly instructed as to the meaning of the Railway Labor Act, its decision would be different.

The cases cited on page 14 of the opposing brief merely hold that a question of law arising under a railway collective bargaining agreement is not *necessarily* a federal question. These cases involved discharge and seniority questions—matters about which the Railway Labor Act leaves the parties free to adopt whatever rules they desire. No construction of the act was required for a proper decision of these cases.

At all stages of this case Petitioners have contended that the National Mediation Board had jurisdiction in the premises (Appendix of Pet., pp. 41, 55, 61, 72). The court below disagrees with this contention. Whether that court is right or not is wholly a matter of federal law, and the point is of controlling importance in the case.

POINT II. At All Stages of This Case Petitioners Have Contended That Respondent Was Required to Exhaust Its Administrative Remedies Before Seeking Judicial Relief Against the Strike. This Claim Presents a Federal Question Which Must Be Decided Before a Court Can Reach the Merits of the Case.

The contract question, which Respondent advances as a non-federal ground, is a point which goes to the merits of the case. If our contention that Respondent had a duty of exhausting the remedies prescribed by the Railway Labor Act to prevent strikes, before seeking judicial relief, is sound, then the court below should never have reached the merits. Any decision on the merits, then, would not be adequate to support the judgment as against this contention.

As the decision now stands, a carrier can ignore the machinery provided by the Railway Labor Act for minimizing disputes, and can go immediately to the state courts. Surely Congress did not provide this administrative machinery for the sole benefit of employers—to be used by them or not, as they see fit. The failure of the court below to apply the requirement of exhaustion of Federal administrative remedies appears to be the plainest of errors.

A question of the availability of judicial remedies in railway labor cases is manifestly a federal question. *Slocum v. D. L. and W. R. Co.*, 339 U. S. 239; *General Committee v. M. K. T. Ry.*, 320 U. S. 323.

Respectfully submitted,

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